IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 31

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Petitioners

v.

MARCOS GONZALES, *Respondent*

On Writ of Certiorari to the California District Court of Appeal

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The June 12, 1956 opinion of the First District Court of Appeal of the State of California is reported at 142 Cal. App. 2d 207, 298 P. 2d 92 (R. 117). The prior February 16, 1956 opinion of the First District Court of Appeal, which was superseded by the June 12, 1956 opinion, is not officially reported but may be found at 139 A.C.A. 2d 263. The June 7, 1954 opinion of the Superior Court is not reported (R. 16). For convenience, the relevant portions of the February 16, 1956

and the June 12, 1956 opinions of the District Court of Appeal are printed respectively as Appendix A (*infra*, p. 1a) and Appendix B (*infra*, p. 3a).

JURISDICTION

The judgment of the First District Court of Appeal of the State of California was entered on June 12, 1956 (R. 117). A timely petition for hearing was filed in the California Supreme Court and denied on August 8, 1956. A petition for a writ of certiorari was filed on October 31, 1956 and granted on January 14, 1957 (R. 146). 352 U.S. 966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., 141 *et seq.*) are set forth in Appendix C, *infra*, pp. 9a-15a.

QUESTION PRESENTED

The state court entered a judgment against petitioners awarding compensation to respondent for loss of wages and mental distress. It found that petitioners refused to refer respondent for work because he was not a union member, thereby causing employers to refuse to hire respondent. The union conduct redressed by the state court by damages is an unfair labor practice proscribed by Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended. The question presented is whether the exclusive jurisdiction of the National Labor Relations Board to remedy such conduct is displaced for any of the following reasons: (1) The state court classified the conduct as a breach of contract rather than as an

unfair labor practice; (2) the state court awarded damages for mental distress; and (3) the state court ordered respondent restored to union membership based on its finding that he had been wrongfully expelled.

STATEMENT

In March, 1952, Marcos Gonzales, respondent herein, was expelled from membership in Local Lodge No. 68, International Association of Machinists.[1] Following his expulsion, the Union[2] refused to dispatch respondent for employment pursuant to a hiring procedure and practice in effect between the Union and employers whose employees the Union represented; this caused employers to refuse to hire him (R. 56-62, 72-73, 92-99, 101-102). As the District Court of Appeal stated (R. 131-132): "The ordinary practice was for employers to telephone the union hall for men, and the union members would be dispatched to the work. Thereafter [following respondent's expulsion] he applied to the union for an assignment to a job as he had done prior thereto. He was refused dispatch by the union dispatcher. He testified he sought work

[1] The Superior Court found that there was sufficient evidence to support the Union Trial Committee's determination that respondent was guilty of the offense with which he was charged within the Union—falsely accusing a union officer of having assaulted him or having instigated an assault upon him (R. 18). It nevertheless found that the penalty for the offense was not imposed in accordance with the internal procedures prescribed by the Union and its parent body, and for that reason the Union could not lawfully expel respondent from membership for refusing to pay the fine and make the apology called for by the penalty (R. 18-21, 118-26).

[2] The word "Union" is generally used herein to refer to the local lodge.

directly from the employers, but without success. Although there was some testimony to the effect that the union might dispatch a non-member to a job if he had a letter from the employer requesting him, the dispatcher testified that plaintiff would not have been dispatched even if he had such letter."

Respondent filed a charge of unfair labor practices with the National Labor Relations Board and then voluntarily withdrew the charge (R. 65, 67-68).[3] Instead, on December 3, 1952, respondent instituted suit in the Superior Court of California, City and County of San Francisco (R. 1). Based upon his allegation that his expulsion from union membership resulted from "illegal procedures," respondent sought an order restoring him to membership in the Union in good standing (R. 6-7). Based upon his allegation that he "has been unable to secure employment in his former occupation" by reason of his expulsion, respondent also sought recompense for "loss of earnings" (R. 6-7). He thereafter amended his complaint to request exemplary damages and compensation for mental distress as well (R. 15). In answer, the Union alleged in part that "the plain, speedy and adequate remedy in the ordinary course of law is available to [respondent]

[3] It is undisputed that the requisite affect upon interstate commerce to confer jurisdiction upon the NLRB existed. Following his expulsion from the union, respondent was refused work at Columbia Machine Company, Triple A Machine Shop, Wagner-Niehaus, and Matson Navigation Company (R. 58). The Union had been certified by the NLRB as the representative of the employees of the first three named employers (R. 134). The Union was also certified as the representative of the employees of Pacific Ship Repair, Inc. (R. 134), where respondent last worked in February 1952 (R. 63). From 1950 to 1952, respondent worked as a marine machinist for the General Electric Company (R. 55). Respondent worked primarily on ocean-going vessels (R. 36).

under the provisions of Sections 8(b)(1) and 8(b)(2) of the National Labor Relations Act as amended" (R. 13).

After trial, the Superior Court entered a judgment requiring the Union to restore respondent to membership in good standing (R. 16). It also "awarded damages only against . . . International Association of Machinists (Grand Lodge) and International Association of Machinists, Local Lodge No. 68, for $6,800.00 damages for loss of wages and $2,500.00 damages for mental suffering, humiliation and distress" (R. 16). The Superior Court denied exemplary damages (R. 21).

The jurisdiction of the state court to restore respondent to Union membership alone is not disputed. The jurisdiction of the state court to enter a money judgment for damages to compensate respondent for loss of wages and mental distress resulting from loss of employment caused by the discriminatory refusal to refer him for work is disputed. On appeal, the District Court of Appeal at first agreed with petitioners that no such jurisdiction existed, and it vacated the whole of the money judgment. It stated (*infra*, pp. 1a-3a):

> The Taft-Hartley Act prescribes in part: "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, *That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to acquisition or retention of membership therein; . . .*" (29 U.S.C. § 158; emphasis added [by the court].) In construing this section the courts have held that the courts have jurisdiction to restore union membership to a member improp-

erly deprived thereof by his union. As said in Mahoney v. Sailors' Union of the Pacific (Wash., 1954) 275 P. 2d 440, improper expulsion by the union does not constitute an "unfair labor practice" which under the act takes jurisdiction away from the courts. (See also Real v. Curran, 138 N.Y.S. 2d 809.) But a different situation results when the member seeks damages as a result of such expulsion. The courts hold that the act authorizes the Labor Relations Board to compensate the member for loss of earnings if lost through "the procedures followed by the union whereby employers were caused to discriminate against" such members (idem, p. 444); such procedures constitute an unfair labor practice. There are many cases holding it to be an unfair labor practice for the union in any way to cause an employer to fail to employ the discharged member. Among others are Born v. Laube, 213 F. 2d 407, cert. den. Oct. 18, 1954, 348 U.S. 855; Radio Officers' Union, etc. v. National L. R. Bd., 347 U.S. 17, 74 S.Ct. 323; Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 75 S.Ct. 480. There are three cases, almost identical in this respect with the one at bar, in which the union after improperly expelling the member, took no active steps to notify the employer not to employ him, but, as here, merely refused to issue the employee a hiring hall card or to dispatch him to the job. In each of those cases it was held that such action constituted an "attempt to cause an employer . . . to discriminate against" the employee (29 U.S.C. § 158), and therefore was an unfair labor practice as to which Congress had given the Labor Relations Board exclusive jurisdiction. (Mahoney v. Sailors' Union of the Pacific, supra, 275 P. 2d 440; Sterling v. Local 438, etc., (Md., 1955) 113 A. 2d 389; Real v. Curran, supra, 138 N.Y.S. 2d 809). In the latter case the court said (p. 812): "If the union caused or attempted to

cause plaintiff's discharge from his existing employment with the United States Lines, as is alleged—*either by hiring procedures,* or by causing union members not to work with him—it has committed an unfair labor practice within the contemplation of the section, and the National Labor Relations Board can direct the union to cease and desist from such conduct." (Emphasis added [by the court].)

* * *

Because the withholding from petitioner of the required card to obtain employment and the refusal of the union's dispatcher to send petitioner out on a job constituted unfair labor practices, and consequently the exclusive jurisdiction of the damages issue is in the Labor Relations Board, we are forced to hold that the award of damages by the trial court was beyond the jurisdiction of the court and must be reversed.

On rehearing, the District Court of Appeal reversed tself and restored the money judgment. It stated that, 'So far as the award of damages is concerned, it was warded not for an unfair labor practice, but for reach of contract [the court taking the view that the onstitution of the union constitutes a contract with he members] and as incidental to the restoration to laintiff of his right of membership" (R. 127, *infra,* . 4a). It recognized that there "are many cases olding it to be an unfair labor practice for a union n any way to cause an employer to fail to employ an xpelled member (whether the expulsion be proper or mproper), and that the National Labor Relations Act uthorizes the Labor Relations Board to compensate he member for loss of earnings if lost through the rocedures followed by the union whereby employers

were caused to discriminate against such members" (R. 128, *infra*, p. 5a). But it distinguished the exclusive jurisdiction of the National Labor Relations Board in those cases from the instant situation on the ground that "in all those cases the charge was made that the acts of the union constituted unfair labor practices and such charge was in issue in each case" (R. 128, *infra*, p. 5a). It was of the view that here the "damage was not charged nor treated as the result of an unfair labor practice but as a result of the breach of contract" (R. 127, *infra*, p. 3a). In the preceding sentence it stated that "the evidence adduced at the trial showed plaintiff because of his loss of membership was unable to obtain employment and was thereby damaged." The court also did not advert to the fact that petitioners in their answer had explicitly put in issue the availability of a remedy "under the provisions of Sections 8(b)(1) and 8(b)(2) of the National Labor Relations Act as amended" (R. 13), nor to the fact that respondent had filed a charge of unfair labor practices with the National Labor Relations Board (R. 65, 67-68).

SUMMARY OF ARGUMENT

1. The state court entered a judgment against petitioners awarding compensation to respondent for loss of wages and mental distress. Petitioners refused to refer respondent for work because he was not a member of the union, thereby causing employers to refuse to hire respondent. The conduct redressed by the state court by an award of damages is an unfair labor practice proscribed by Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended.

2. It is settled law that the National Labor Relations Board has exclusive jurisdiction to investigate, adjudicate, and remedy conduct which is an unfair labor practice under the National Labor Relations Act.

3. The exclusive jurisdiction of the National Labor Relations Board cannot be displaced by the state court because it labels the basis of its intervention as adjudicating a breach of contract. It is the conduct which the state court presumes to regulate, and not the label which it chooses to affix to it, which is decisive.

4. Nor can the exclusive jurisdiction of the National Labor Relations Board be displaced by the state court because it awards damages for mental distress. That the state court would afford a different remedy than would the National Labor Relations Board, far from vesting the state court with jurisdiction, illustrates a reason why the Board's jurisdiction is exclusive.

5. Finally, the power of the state court to restore an individual to union membership upon its finding that he was wrongly expelled carries with it no authority to award him damages for loss of employment caused by his lack of union membership. Compliance with a federal statutory scheme for regulation of union conduct embodied in Section 8(b) of the Act demands that the authority of the state over local questions not displace the Board's exclusive jurisdiction in carrying out a national policy in the enforcement of the National Labor Relations Act. The goal of attaining uniformity in national questions of labor relations would be frustrated if the existence of a local question in any controversy empowered the state to determine also those questions vested solely in the National Board.

ARGUMENT

A STATE COURT HAS NO JURISDICTION TO ENTER A JUDGMENT AGAINST A UNION AWARDING COMPENSATION FOR LOSS OF WAGES AND MENTAL DISTRESS RESULTING FROM LOSS OF EMPLOYMENT CAUSED BY UNION ACTIVITY PROSCRIBED AS UNFAIR LABOR PRACTICES BY SECTIONS 8(b)(1)(A) AND 8(b)(2) OF THE NATIONAL LABOR RELATIONS ACT

I. THE CONDUCT REDRESSED BY THE STATE COURT BY DAMAGES IS AN UNFAIR LABOR PRACTICE PROSCRIBED BY SECTIONS 8(b)(1)(A) AND 8(b)(2) OF THE NATIONAL LABOR RELATIONS ACT

The Union refused to dispatch respondent to work because he was not a union member, thereby causing employers to refuse him employment. The state court awarded respondent money damages for the ensuing loss of wages and mental distress. The conduct for which redress was granted is a common unfair labor practice condemned by the National Labor Relations Act. The narrow area of valid application of a lawful union security agreement aside, discrimination in employment based upon union membership or the want of it is an unfair labor practice when engaged in by an employer (Sec. 8(a)(3) and (1) of the NLRA), or when caused or attempted by a union (Sec. 8(b)(2) and (1)(A) of the NLRA). *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17.[4]

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[4] See also, *Born* v. *Laube*, 213 F. 2d 407 (C.A. 9), rehearing denied, 214 F. 2d 349, cert. denied, 348 U.S. 855; *Mahoney* v. *Sailors' Union*, 45 Wn. 2d 453, 275 P. 2d 440, cert. denied, 349 U.S. 915; *Sterling* v. *Local 438, Liberty Assn. of Steam and Power*, 207 Md. 132, 113 A. 2d 389, cert. denied, 350 U.S. 875; *McNish* v. *American Brass Co.*, 139 Conn. 44, 89 A. 2d 566, cert. denied, 344 U.S. 913; *Real* v. *Curran*, 285 App. Div. 552, 138 N.Y.S. 2d 809; *Morse* v. *Carpenters Union*, 304 P. 2d 1097 (Idaho).

Indeed, the conduct in *Radio Officers* is the prototype of that here. There, the union declined to clear an employee for a job with a steamship company in accordance with the hiring procedure because of the employee's claimed lack of union membership in good standing. 347 U.S. at 28-33. Here, the union declined to refer respondent for employment in accordance with the hiring procedure because of his expulsion from union membership. And in *Radio Officers*, after enforcement of the National Labor Relations Board order, a supplemental intermediate report was issued in which the trial examiner recommended an order requiring the union to "pay to Willard Fowler [the employee discriminated against] the sum of $17,855.37 in satisfaction of the order directing the Respondent [union] to make Fowler whole."[5] So here, the state court money judgment is designed in major part to make respondent whole for his loss in wages.

It is, therefore, plain that the state court has taken in hand the identical conduct regulated by the National Labor Relations Act, and has awarded a remedy which parallels that conferred by the National Labor Relations Board for that conduct.

II. THE NATIONAL LABOR RELATIONS BOARD HAS EXCLUSIVE JURISDICTION OVER CONDUCT WHICH IS AN UNFAIR LABOR PRACTICE UNDER THE NATIONAL LABOR RELATIONS ACT

This case is squarely within the settled rule that redress of discrimination in employment is within the sole jurisdiction of the National Labor Relations Board to the exclusion of any other tribunal. *Guss* v. *Utah*

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[5] *Radio Officers' Union*, Case No. 2-CB-91, November 1956, p. 16. The case was closed upon compromise compliance with the trial examiner's recommended order.

Labor Relations Board, 353 U.S. 1 (discriminatory discharge in violation of Section 8(a)(3), among other violations alleged); *San Diego Building Trades Council* v. *Garmon,* 353 U.S. 26 (picketing to compel the adoption of an invalid union security agreement in violation of Section 8(b)(2)); *Garner* v. *Teamsters Union,* 346 U.S. 485 (picketing to coerce the employers into compelling or influencing their employees to join the union in violation of Section 8(b)(2)); *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board,* 338 U.S. 953 (discriminatory discharge in violation of Section 8(a)(3)).

It is noteworthy that in each of the cited cases, as here, an aspect of discrimination in employment was involved, either as a violation of Section 8(a)(3), or its counterpart, Section 8(b)(2). But the rule of preemption of state action is general, and applies whenever the conduct in controversy is within the regulatory power of the National Labor Relations Board. *Amalgamated Meat Cutters* v. *Fairlawn Meats,* 353 U.S. 20; *Weber* v. *Anheuser-Busch, Inc.,* 348 U.S. 468; *Local 25, Teamsters Union* v. *N.Y., N.H. & H. R.R.,* 350 U.S. 155. The necessity of avoiding diversities and conflicts has been repeatedly recognized. As this Court stated in *Garner* v. *Teamsters Union,* 346 U.S. 485, 489-491:

> The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief.
>
> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and ap-

> plication of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.

Diversities and conflicts avoided by federal preemption would inevitably ensue if state courts adjudicated the often difficult and complex problems which inhere in cases of alleged discrimination in employment. Formulation and application of standards pertinent to these problems is a continuing function of the National Labor Relations Board. To permit the same problems to be concurrently handled by the necessarily ad hoc and sporadic adjudication of a court of general jurisdiction is bound to result in disparity.

This case, therefore, is squarely within the settled rule preempting state court adjudication. We turn to the considerations which may be suggested as excepting it from the rule.

III. THE CHARACTERIZATION WHICH THE STATE PLACES UPON THE CONDUCT IS NOT DETERMINATIVE OF THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD

The California court justified its assertion of jurisdiction by stating it was adjudicating a breach of con-

tract and not an unfair labor practice (*supra*, pp. 7-8). Whether or not the record would justify this view, it is beside the point. It is the conduct which the state court presumes to regulate, not the label which it chooses to affix to it, that is decisive. Congress having taken the subject matter in hand, California is no more free to act in the name of breach of contract than Missouri was in the name of restraint of trade[6] or Pennsylvania, Wisconsin, or Utah in the name of their state labor relations statutes.[7] "... [W]hen two separate remedies are brought to bear on the *same activity*, a conflict is imminent." *Garner* v. *Teamsters Union*, 346 U.S. 485, 490 (emphasis added). And so state action is precluded. "Controlling and therefore superseding Federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised." *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 479.

IV. THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD CANNOT BE DISPLACED BY THE STATE COURT AWARDING DAMAGES FOR MENTAL DISTRESS FOR CONDUCT CONSTITUTING UNFAIR LABOR PRACTICES

The power of the state court to act cannot be founded upon the fact that it, unlike the National Labor Relations Board, awards damages to compensate the employee for the mental distress caused by his

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[6] *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468 (restraint of trade under Missouri common law and conspiracy statutes).

[7] *Garner* v. *Teamsters Union*, 346 U.S. 485 (Pennsylvania Labor Relations Act); *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953 (Wisconsin Employment Peace Act); *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1 (Utah Labor Relations Act).

discriminatory loss of employment.[8] The difference in the remedy employed by the state court and the National Board, far from supporting the conclusion that state power to act exists, emphasizes the reason why it does not. For just such disparity illustrates the conflict that preemption is designed to avoid. The Court of Appeals for the Ninth Circuit, in holding that the Board's lack of power to assess punitive damages does not provide a basis for state action, explained that (*Born* v. *Laube*, 213 F. 2d 407, 410, cert. denied, 348 U.S. 855):

> It is argued that the Board, although having authority to require the offending union to reinstate and financially to make whole the victim of the unfair labor practice, is without power to assess punitive damages; consequently, the view should be taken that Congress did not intend to preclude the victim from enforcing this private right in an action at common law. However, we think it evident that since the Act provides a procedure for redress and a corresponding

[8] It seems clear that the state court's award of $2,500 damages for mental distress was based upon the distress found to be caused by respondent's discriminatory loss of employment and not for other reasons outside the purview of the National Labor Relations Act. Thus, the District Court of Appeal in its first opinion, when it held that the state court was without power to award damages for discriminatory loss of employment, vacated the whole of the money judgment and did not attempt to allocate any part of it to causes other than loss of employment (*infra*, pp. 2a-3a). And the evidence at the trial shows that the distress claimed by respondent related to his loss of employment (R. 101-113). In any event, assuming *arguendo* that the money judgment for mental distress is allocable partially to reasons other than loss of employment, a remand to the state court is necessary, for it entered a "unitary judgment . . . based on the erroneous premise that it had power to reach the Union's conduct in its entirety." *Amalgamated Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20, 24-25.

> remedy, both the procedure and the remedy are exclusive in the absence of an express provision or Board delegation to the contrary. As said in Nathanson v. NLRB, 344 U.S. 25, 27: "A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice. (Citation). Congress has made the Board the only party entitled to enforce the Act." A remark of Justice Holmes in Charleston & Western Carolina Railway Co. v. Varnville Furniture Company, 237 U.S. 597, 604, though dealing with an unrelated subject, is pertinent here. "When Congress," he said, "has taken the particular subject matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

When Congress confers a right and creates a remedy, it has expressed its judgment as to the desirable scope of regulation, and state action to supplement it is as ineffective as state action to subtract from it. *Missouri Pacific R.R. Co.* v. *Porter*, 273 U.S. 341, 345-346. Indeed, if all that were necessary to confer state power over conduct regulated by the National Labor Relations Act would be to seek and secure a state remedy by way of exemplary damages or damages for mental distress, there would be no aspect of such conduct which could not be subjected to concurrent state and federal control.[9] For example, a

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[9] As in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 480, so here, it suffices to say of *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, that there "the violent conduct was reached by a remedy having no parallel in, and not in conflict with, any remedy afforded by the federal act." As the Court of Ap-

discriminatorily discharged employee, by claiming in a state court mental distress in connection with his discharge, could then sue his employer and also claim compensation for loss of wages which would otherwise be solely remediable by the National Labor Relations Board.

Furthermore, as another example of the disparity that may arise, the federal and state remedy is significantly different in the formula used to compensate the employee for his loss of earnings. At common law, the measure of damages for the breach by the employer of a contract of employment "is what an employee would have earned if he had not been wrongfully discharged, less what he did earn during the period of the breach." *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 355 (dissent). The National Labor Relations Board does not deduct interim earnings for the full period from discharge to offer of reinstatement to employment. Instead, the Board uses a quarterly period of computation, and deducts from what the employee would have earned only those interim earnings which he received during each quarter. *National Labor Rela-*

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peals for the Ninth Circuit observed in denying rehearing in *Born* v. *Laube*, 214 F. 2d 349 (C.A. 9), cert. den. 348 U.S. 855, the complainant, in *Laburnum*, "was wholly without remedy in damages for the tortious conduct of the Union. Here the complaining employee had available the remedy of reinstatement with back pay. Moreover, unlike Laburnum, there was no violence or threat of violence which might serve to bring the cause within the area of the . . . police power." See also, *Mahoney* v. *Sailors' Union of the Pacific*, 45 Wash. 2d 453, 275 P. 2d 440, 445, cert. denied 349 U.S. 915; *Sterling* v. *Local 438, Liberty Association*, 207 Md. 132, 113 A. 2d 389, 395-396, cert. denied, 350 U.S. 875.

tions Board v. *Seven-Up Bottling Co., supra.* Unquestionably, the Boards's method of computation results in greater compensation than the common law rule affords, and designedly so in order to effectuate the reinstatement remedy. It is thus clear that the remedy by way of damages to redress discrimination in employment presents considerations of the "'relation of remedy to policy [which] is peculiarly a matter for administrative competence. . . .'" *Id.* at 349. To permit a state court to award damages for conduct within the same field covered by the National Act cannot but help to create conflicts with the federal administration and policy.

V. THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD TO REMEDY DISCRIMINATION IN EMPLOYMENT IS NOT DISPLACED BY THE STATE COURT'S EXERCISE OF ITS AUTHORITY TO RESTORE AN INDIVIDUAL TO UNION MEMBERSHIP

The exclusive jurisdiction of the National Labor Relations Board to make an employee whole for denial of employment to him based on his lack of union membership is not displaced by the state court's exercise of its authority to restore that employee to union membership from which he was wrongfully expelled.[10] The two facets of the matter are separate and distinct. Authority of the state over membership in a voluntary association does not carry with it authority to award damages to compensate an employee for discriminatory denial of employment. *Mahoney* v. *Sailors' Union,* 45 Wn. 2d 453, 275 P. 2d

[10] The question whether or not the court below properly decided that respondent was wrongfully expelled is not before this Court.

440, cert. denied, 349 U.S. 915;[11] *Real* v. *Curran*, 285 App. Div. 552, 138 N.Y.S. 2d. 809. In each of these cases, the state court stopped with restoring the individual to union membership; it recognized that it would be beyond its province, and an invasion of the exclusive jurisdiction of the Board, also to remedy the discriminatory denial of employment to the individual by awarding him compensation for loss of earnings.

We shall show that, under the regulatory scheme of the National Labor Relations Act, Congress has

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[11] Recently, in *Selles* v. *Local 174, Teamsters Union*, 40 LRRM 2573, 2576-2577 (Wash. Sup. Ct., August 8, 1957), the Washington Supreme Court reaffirmed its position in the *Mahoney* case. It nevertheless drew an untenable distinction between an employee's attempt to secure reinstatement to his job and back pay, which the court held was within the exclusive jurisdiction of the NLRB, and an employee's attempt to secure back pay only, which the court held the state had power to entertain as a common law tort of interference with employment. The distinction is untenable because the NLRB in the exercise of its jurisdiction frequently awards back pay without also awarding reinstatement. Thus, the NLRB, without ordering reinstatement, awards back pay (1) when the employee has found a better job and does not wish to be reinstated, (2) when the employee has incurred an intervening physical disability and is not qualified for reinstatement, (3) when he has been reinstated prior to the NLRB's order but has not received back pay for the period during which the discrimination persisted, or (4) when the employer has since discontinued his business so that there is no longer a job to which the employee can be reinstated. See *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 54-55; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 113 F. 2d 202, 205 (C.A. 2), affirmed, 313 U.S. 177, 200; *Indianapolis Power & Light Co.* v. *National Labor Relations Board*, 122 F. 2d 757, 763 (C.A. 7), cert. denied, 315 U.S. 804; *George C. Quinley*, 92 NLRB 877, 880. The *Selles* case illustrates the inevitable confusion which results whenever a state court seeks to remedy any segment of discrimination in employment.

separated the field of internal union membership from the field of discrimination in employment; that the area within which the state remains free to operate is confined to internal union membership; that the area which is confided to the Board's sole responsibility is the field of discrimination in employment; and that to permit the state to pass from its field to the Board's field will obliterate the line that Congress has drawn and will work the disruption which preemption is designed to avoid.

1. *The field of internal union membership:* Whether to restore an individual to union membership from which he was allegedly wrongfully expelled presents considerations outside the concern of the National Labor Relations Act. As this case illustrates (R. 117-126), the questions presented are peculiar to the law of voluntary associations: whether internal union remedies have been exhausted, whether the wrong alleged is a punishable offense, whether evidence supports the finding of guilt, whether the internal union procedures for trial, punishment, and review have been followed by the association, whether they are consistent with fair procedure, and the like.[12] The National Labor Relations Act is indifferent to these questions and the Board claims no responsibility in relation to them. The state court can, therefore, operate within this field without intruding upon any matter of exclusive federal concern.

Thus, while Section 8(b) (1) (A) of the National Labor Relations Act forbids restraint and coercion of employees by unions, the proviso to it is explicit that

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[12] See Sumners, Legal Limitations On Union Discipline, 64 Harv. L. Rev. 1049 (1951).

"this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership." Because the sponsors of Section 8(b) (1) (A) did not intend "to affect at least that part of the internal administration which has to do with the admission or the expulsion of members" (93 Cong. Rec. 4271), Senator Holland introduced the proviso to "make it clear that the pending amendment would have no application to or effect upon the right of a labor organization to prescribe its own rules of membership either with respect to beginning or terminating membership" (93 Cong. Rec. 4272). Senator Ball who sponsored Section 8(b) (1) (A) agreed to incorporating the proviso, explaining that "It was never the intention of the sponsors . . . to interfere with the internal affairs or organization of unions," and adding that the union "can expel [a member] from the union at any time it wishes to do so, and for any reason" (93 Cong. Rec. 4272). In conference, the conferees rejected a provision of the House bill[13] which prohibited expulsion from union membership except under specified conditions, and adopted, in its stead, the proviso to Section 8(b) (1) (A).[14]

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[13] H.R. 3020, 80th Cong., 1st Sess., Sec. 8(c) (6).

[14] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 46.

Similarly, while Section 8(a) (3) of the amended Act bans the closed shop and prohibits union membership from being a condition of employment except in narrow circumstances, it is clear that this does not affect a union's right to control its own membership according to its own standards. The Senate Committee explained (S. Rep. No. 105, 80th Cong., 1st Sess., pp. 20, 21):

> The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion

Accordingly, regardless of its reason, a labor organization's exertion of union discipline, when exercised only by internal regulation of the terms of the acquisition and retention of membership, is excluded by the proviso to Section 8(b) (1) (A) from being an unfair labor practice. *American Newspaper Publishers Ass'n.* v. *National Labor Relations Board,* 193 F. 2d 782, 800 (C.A. 7), cert. denied on this question, 344 U. S. 812; *Union Starch & Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008, 1012 (C.A. 7), cert. denied, 342 U.S. 815. A state can therefore

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therefrom. * * * It is to be observed that unions are free to adopt whatever membership provisions they desire * * *.

Senator Taft stated (93 Cong. Rec. 4193):

> The pending measure does not propose any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they still will be able to try any of their members.

The line drawn is clearly marked as well in a colloquy between Senators Taft, Ball, and Pepper (93 Cong. Rec. 4272):

> Mr. Taft. * * * The union could refuse membership; but if the man were an employee of the company with which the union was dealing, the union could not demand that the company fire him. The union could refuse the man admission to the union, or expel him from the union; but if he were willing to enter the union and pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him.
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> Mr. Pepper. And the union can admit to membership anyone it wishes to admit, and decline to admit anyone it does not wish to accept.
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> Mr. Ball. That is correct. But the union cannot, by declining membership for any other reason than nonpayment of dues, thereby deprive the individual concerned of the right to continue in his job. In other words, it cannot force the employer to discharge him.

restore an individual to union membership, and can determine the questions relevant to the issues of retention of membership in a voluntary association, without in any degree colliding with federal authority.

2. *The field of discrimination in employment:* When a state court departs from the field of internal union membership and enters the field of discrimination in employment, it at once invades the area of exclusive federal concern. For, while a union is free, so far as the federal statute is concerned, to adopt and pursue any membership policy it deems wise, to exert any internal union discipline it desires, and to deny or terminate membership on any ground it chooses, the essence of the statutory scheme is that a union is forbidden to exercise control over employment based on any aspect of an employee's status with the union other than to compel dues payment through a union security agreement. Union membership or the lack of it and the right to a job are divorced. And the statute commits to the Board alone the authority to protect an employee's employment rights. The heart of the statutory scheme as it relates to discrimination in employment, and consequently the area of exclusive federal concern, was authoritatively expressed by this Court in *Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 40-42:

> The policy of the Act is to insulate employee's jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to § 8(a)(3), which authorizes employers to enter

into certain union security contracts, but prohibits discharge under such contracts if membership "was not available to the employee on the same terms and conditions generally applicable to other members" or if "membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." Lengthy legislative debate preceded the 1947 amendment to the Act which thus limited permissible employer discrimination. This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," *i.e.*, employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason. Thus an employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union, and if the other requirements of the proviso are met. No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned.

3. *To permit the state to pass from its field to the Board's field creates the conflict that preemption is designed to avoid:* The field of discrimination in employment is the exclusive concern of the Board; the field of internal regulation of the acquisition or retention of union membership is within the authority of the state. When, as here, a state court awards damages

to compensate an employee for discriminatory denial of employment, it inescapably invades the area of exclusive federal responsibility. The disparity and conflict it creates is no less because it does so in conjunction with restoration of the employee to union membership. All the considerations which forbid it to act within the field of employment obtain just as well.

The state and federal tribunals can move within their respective orbits without risk of collision. When they confine their activity to their own orbits they respect the line which the federal statute enjoins. But a state court's authority to act within its area of responsibility implies no authority to overstep it.

Congress did not intend its detailed regulation of discrimination in employment contained in Sections 8(a) (3) and 8(b) (2) of the Act to be duplicated by local law, or to be adjudicated by a local tribunal, simply because the right to membership under local law might also be raised. Discrimination in employment not infrequently occurs in connection with expulsion from a union. Congress knew this, and certainly did not intend that a multiplicity of tribunals adjudicate prohibitions in the Act concerning union discrimination in such cases, for it enacted these prohibitions at the same time it specifically exempted from the scope of the Act any control over internal union affairs. Nothing in the federal statute suggests that Congress intended that there should be local handling of the federal question whenever the right to union membership was put in issue in conjunction with discrimination in employment. To permit the state court's authority over the membership segment of a controversy to be the basis for state jurisdiction over the whole

would clearly disrupt the federal statutory scheme in a significant number of discrimination cases. In *Amalgamated Meat Cutters* v. *Fairlawn Markets, Inc.*, 353 U.S. 20, 24, the fact that the state might "frame and enforce an injunction aimed narrowly at trespass" which would not intrude upon the federal scheme did not empower it to take the whole controversy in hand. So here, the state's authority over the membership segment of the dispute does not authorize it to engulf the whole controversy.

The jurisdiction of the National Labor Relations Board is exclusive, even where the practical consequence is that the federal agency will not act and the state agency cannot act. *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1. *A fortiori* the Board's jurisdiction is exclusive here. For the state court's authority to safeguard membership rights is not impaired by the exclusive authority of the Board to make an employee whole for loss caused by discrimination in employment. The state court can still enter an effective judgment restoring the individual to his membership rights within the union. Furthermore, since state action redressing discrimination in employment is plainly excluded in the absence of restoration to union membership, damages can only be awarded by a state court after it first finds that the individual has been wrongfully expelled from the union. But a finding of wrongful expulsion from union membership is an irrelevancy under the federal scheme. For whether expulsion is proper or improper, the Act provides that in neither event can it be made the basis of loss of employment. The upshot is that to exclude the state from the field of discrimination in employment is necessary to the effective functioning of the federal scheme and does

not impair its interest within the field of internal union membership. Both the state and federal interests are preserved within their proper orbits without conflict.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment should be reversed.

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